United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

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UNITED STATES COURT OF APPEALS

for the Second Circuit

Docket No. 75-1037

RAYMOND COUGHLIN,

Appellant

- against -

UNITED STATES OF AMERICA,

Appellee

On Appeal from the United States District Court for the Eastern District of New York

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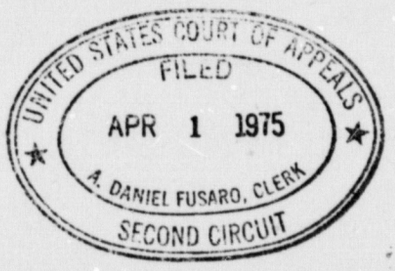
BRIEF AND APPENDIX FOR APPELLANT



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STATEMENT

Raymond Coughlin appeals from a Judgment of Conviction entered in the United States District Court for the Eastern District of New York on January 10, 1974 after a denial of motions for a new trial and after a twelve week trail before the Honorable Mark Constantino, United States District Judge and a jury.

The petitioner was found guilty on Counts 10 and 14 of a fourteen-count indictment of which five were before the jury.

Count 10 charged theft from foreign commerce in violation of 18 U.S.C. Sec. 659.

Count 14 charged a conspiracy among 23 persons in violation of 18 U.S.C. Sec. 371 to steal items of personal property from foreign commerce in violation of 18 U.S.C. Sec. 659.

Judge Constantino sentenced Raymond Coughlin to a term of imprisonment of eighteen months on each count to run concurrently.

The appellant is presently at liberty under bail pending the determination of this Appeal.

REFERENCE TO OTHER BRIEFS

Pursuant to Rule 28(i) of the Federal Rules of Criminal Procedure, the petitioner hereby incorporates all points raised in the briefs of appellants, Neil Pacilio, Carmine Picora, Charles Green, Albert Grasso and Fred Smith, and their Statements of Facts. All named appellants were tried and convicted on only the conspiracy count at the same trial.

ARGUMENT

POINT I

IT WAS ERROR TO PERMIT MR. SOMERFORD TO TESTIFY AS AN EXPERT WITNESS AND TO DENY A MOTION FOR A NEW TRIAL BECAUSE OF THE PREJUDICIAL EFFECT AS TO ALL THE PETITIONERS.

The qualifications of a witness to testify as an expert are preliminary matter for the trial court. Inland and Seaboard Coasting Co. v. Tolson, 139 U.S. 551, 560. The probative value of expert testimony is far crucial in a criminal as constrasted with a civil proceeding for the obvious reason that a man's liberty is at stake.

The qualifications of a handwriting expert are perhaps the most critical issue in determining the validity of his opinion, cf. U.S. v. Zeigler, 475 F.2d. 1280 (D.C. Cir. 1972), which reversed the lower court's findings that the expert was qualified. The trial judge indirectly implied that Mr. Somerford's credentials appear to be inadequate. A mere reading of an expert's book (his father's) might not an expert make. (Minutes at 4206). The Court in clear language points to the fact that the Government might have chosen another expert, perhaps more qualified, or might have avoided a person of such questionable qualifications. (Minutes at 4211). The Government appears to grope for indictions of Somerford's qualifications, the Court seems to agree that the

prosecution is groping. (Minutes at 4211). Conservatism is not a matter of qualification, but one of occupational approach or attitude. In determining qualifications of an expert, education, training and practical experience are all important; but when a court must resort to an on-the-job trainee to serve as an expert witness, it might appear that the cause of justice is obviated. The months on-the-job does not an expert make.

At trial, Drew Somerford testified as a handwriting expert. His background included a father who had been an expert on questioned documents; three years' experience as an apprentice; and eight months' experience as a qualified expert. Only one three-week course made up his entire formal training in handwriting identification. Of course, some of his apprenticeship training dealth with this topic as well.

Mr. Somerford first prepared reports dealing with the documents at issue at trial when he was not yet an expert. Given the time frame of this case, he may have had as little as two years apprenticeship training at that time. When he testified at trial, his reports still had to be reviewed by superiors before they were released.

The defense objected to Mr. Somerford's testimony. A request for an advance charge on expert testimony was made after that objection was denied. While ruling against

an advance charge, the Court did give a brief caution.

For this reason, petitioner requests that the denial of his motion (Appendix M) of appellants Green, Grasso and Smith's Brief,was improper.

POINT II

THE PETITIONER, RAYMOND COUGHLIN, WAS DEPRIVED OF HIS FIFTH AMENDMENT RIGHT TO BE TRIED ON AN INDICTMENT AS RETURNED BY A GRAND JURY.

During his charge to the jury, the trial court read a revised version of Count 10 of the Indictment (Appendix 1 and 2), which deleted the names, Anthony Bencivenga, Joseph Conte, Hildo Gillis, Pasquale Macchirole, Frank Questel and Gerard Ruggiero, from the Count.

The deletion was done over the objection of counsel [See Appellants' Brief, Green, Grasso and Smith, Point VII incorporated by reference here]. Two of the people deleted, Joseph Conte and Frank Questel, had had all charges dismissed against them upon their prior motion.

The names of Hildo Gillis and Pasquale Macchirole were deleted upon the trial courts own initiative.

The names of Anthony Bencivenga and Gerard Ruggiero were eliminated for no apparent reason.

The names of John Macchirole, Neil Pacilio and Carmine Picora were removed from the consideration of this count as principals by the Government's concession that such persons could only be found guilty of this offense if found guilty of the conspiracy count, Count XIV.

This left only the name of Raymond Coughlin for consideration on this count. The Grand Jury did not say that

the last three named people could only be found guilty of this count by a virtue of a conspiracy. The Government has no authority to so change the meaning of this indictment merely to conform to its concept of what the charge meant and what it tried to prove. Had these counts not been joined in this "dragnet", this alteration would have been impermissible.

That the petitioner's substantive rights were seriously affected by the elimination of the juxtaposition of his name with that of Joseph Conte, against whom the entire Indictment was dismissed, is readily apparent when the testimony at the trial had placed both the petitioners Coughlin and said Conte at Brooklyn Pier 11 on the day in question and working together. Ex Parte Bain, 121 U.S. 1 (1887); Stirone v. U.S., 361 U.S. 212 (1960); Dodge v. U.S. 258 F.300 (2d. Cir. 1919), cert. denied, 250 U.S. 660.

Such a change in the Indictment deprived the Court of any jurisdiction over the petitioner because of this unauthorized amendment of the indictment over objection which affected his substantive rights.

CONCLUSION

Based on the reasons herein stated, it is respectfully submitted that the judgment heretofore imposed upon petitioner by the United States District Court for the Eastern District of New York, be reversed.

Respectfully submitted,

Samuel R DeLuca

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ATTORNEY FOR APPELLANT,
COUGHLIN.

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Charge

their own use, embezzle, steal, take and carry away from Brooklyn Port Authority Pier 11, chattels of a value in excess of one hundred dollars, that is, 270 crates of frozen seafood which were moving as, were a part of, and which constituted a foreign shipment of freight from Bangkok, Thailand to New York, New York.

Title 18, United States Code, Section 659 & 2.

Count 7:

On or about the 23rd day of August, 1972, in the Eastern District of New York, the defendant Raymond Coughlin, the defendant John Macchirole, the defendant Neil Pacilio, and the defendant Carmine Piccora, did wilfully and knowingly, and with intent to convert to their own use embezzle, steal, take and carry away from Brooklyn Port Authority Pier 11 chattels of value in excess of one hundred dollars, that is, 170 crates of frozen seafood which were moving as, were a part of, and which constituted a foreign shipment of freight from Bangkok, Thailand to New York, New York.

Title 18, United States Code, Sections 659 & 2.

Count 10:

On or about the 22nd day of September, 1972, in the Eastern District of New York, the defendant

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Charge

Raymond Coughlin, the defendant John Ma[illegible]chirole, the defendant Neil Pacilio and the defendant Carmine Piccora, did wilfully and knowingly, and with intent to convert to their own use, embezzle, steal, take and carry away from Brooklyn Port Authority Pier 11, chattels of a value in excess of one hundred dollars, that is, approximately 50 crates of frozen fish, which were moving as, were a part of, and which constituted a foreign shipment of freight from Bangkok, Thailand to New York, New York.

Title 18, United States Code, Sections 659 & 2.

Section 659 of Title 18, United States Code, reads in pertinent part as follows:

"Whoever embezzles, steals or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from...any steamboat, vessel, or wharf...with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight or express" shall be guilty of a crime. Counts 1, 4, 7 and 10 also charge the defendants with violating Section 2 of Title 18 United States Code which reads as follows:

(a) Whoever commits an offense against the United States or aids, abets, counsel, commands, [illegible]

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UNITED STATES COURT OF APPEALS
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RAYMOND COUGHLIN, :

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- Against - :

UNITED STATES OF AMERICA, :

Appellee :

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Docket No. 75-1037

CERTIFICATE OF SERVICE

I, SAMUEL R. DeLUCA, ESQ., Attorney for Petitioner in the within cause of action, do hereby certify that on this 1st day of April, 1975, I served the attached Brief and Appendix upon Lauren S. Kahn, Attorney, Appellate Section, Criminal Division, c/o T. George Gilinski, Ben Franklin Station, P.O. Box 899 Washington, D.C. 20044, by depositing a copy in the United States mails, postpaid, and mailed to her at the aforesaid address by Certified Mail, Return Receipt #722368.

Yours etc.,

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